

**BOARD OF APPEALS
REGULAR MEETING MINUTES
OCTOBER 07, 2009**

Members Present: Clayton M. Harrison, Chairman
Gerald Coutinho, Vice Chairman
Donna Lambert, Clerk
Kendal Tripp
Kimberley A. Fernandes, Alternate
William Wyatt, Alternate

Absent: Christopher J. Graham

Chairman Harrison called the Zoning Board of Appeals meeting to order at 7:00 PM in the Westport Town Hall, 816 Main Road, Westport, MA 02790.

EXCEL RECYCLING, LLC – RE: Continued Public Hearing on an application for an Administrative Finding that the current use of the premises is not an alteration / expansion of a non-conforming use; or if an alteration is found, that the change is not substantially more detrimental under the Westport Zoning By-laws Articles 4.1.2 and 4.1.3. The property is also known as Assessor's Map-67, Lot-10.

Sitting on petition: Harrison, Coutinho, Lambert, Tripp, and Fernandes
Attending: Attorney Ilana Quirk, representing the Zoning Board of Appeals
Ralph Souza, Building Inspector/Zoning Enforcement Officer
Attorney John Markey, representing applicant
Marty Costa, applicant/owner of Excel Recycling

Abutters: Ronald & Loretta Price – 323 Main Road
Ed Vieira – 7 Kelsey's Way

Mr. Harrison stated that an onsite was conducted and the Board members observed the equipment that was onsite along with their operation.

Mr. Coutinho asked Mr. Costa to briefly describe what the Board members observed at the onsite in regards to the equipment that was operated.

Mr. Costa stated the Board members observed the old car crusher and the new Sierra baler, that is much more quieter than the old car crusher and in the backyard, the Board members observed a container being loaded by the Sennabogg. The members observed the searing of a 30 – 36 ft. beam. Mr. Costa stated that he ran everything that is typically run during the day.

Mr. Harrison stated the Board members observed the layout of the property, the scale and the abutting property (Lot #9) which is owned by Mr. Moniz. There is material stored on this lot also. Mr. Moniz does have activity on that lot, but no machines and the material is vehicles. Mr. Harrison asked Attorney Quirk what bearing this may have on this matter and should this be considered two operations occurring.

Mr. Moniz stated there are a few vehicles on the lot, and he is selling them to Mr. Costa. Mr. Moniz stated he is cleaning out the lot and looking to create low income housing.

Ms. Lambert asked Attorney Quirk that when the lots were divided, were the rights transferred to Lot #10.

Attorney Quirk stated the property was combined in the '70's and then separated in 2008. The Board needs to look at the changes and ask did a change occur and if it did, how much of a change. Also, did Lot #9 ever have a lawful non-conforming right.

Ms. Fernandes stated that in 1972, Lot #10 was bought and in 1974, Lot #9 was bought and they became one commercial use; Ms. Fernandes asked where was it stated that they were allowed to be combined because only Lot #10 had a non-conforming use.

Attorney Quirk stated there is a concept, merger of lots and this is usually when they are non-conforming; but this case is dealing with use.

Attorney Markey stated that in Mr. Moniz's statement, paragraph #3, the use was when he began to lease the back lot.

Ms. Fernandes asked if this was considered one lot and did it ever come before the Board to get the right permits or whatever was needed.

Attorney Quirk stated there are two issues. The title is still two deeds but at this time you have to consider the use of Lot #10 and ask if there was a change, and if so, is it detrimental.

Mr. Harrison stated there was no license on Lot #9 to this Board's knowledge and only one licensed property, which is Lot #10 before us. Mr. Harrison stated that material has been submitted to the Board: copies of the "Junk Collector's License", a letter from Ron & Loretta Price Second Addendum and correspondence received from Police Chief Pelletier. Mr. Harrison then read the correspondence received from Chief Pelletier.

Mr. Coutinho stated the 2nd Addendum is a 10-page long document. Mr. Coutinho asked Mr. Price if there was anything new in the paperwork submitted by Mr. Price because skimming through, it seems to rehash prior items.

Mr. Harrison stated the Board also received a report from Mr. Price regarding the noise he experienced at his residence while the Board was conducting the onsite.

Attorney Markey stated that he had nothing new to add to the hearing. The single most important question is what was going on then and what is going on now with natural modernization. Attorney Markey said he does not know many boards who have had more hearings on a petition including an onsite and board members doing independent observations. This property has a long history but it has always been there.

Ed Vieira stated there are pictures of a junkyard, which shows scrap metal, it did not show any cars. There never were 18-wheelers when Mr. Moniz was in business.

Mr. Tripp stated that last Friday, at around 2:00 PM, he had an opportunity to enter the yard, as a passenger in another person's vehicle, to bring scrap. The green machine was loading trucks with cubes and the noise was quite a bit less than when the Board members did their onsite. Mr. Price's information on an average lawnmower gives 95 decibels, the metal recycling yard only went to 95 decibels.

Mr. Coutinho stated that Mr. Moniz indicated that in 2004, he dropped out of the business and gave it to his son in 1998 and then the son gave the business back in 2004. There is no affidavit from his son showing a continuation of operation. Also, Mr. Coutinho asked that in looking at the General Bylaws, not the Zoning Bylaws, a junkyard is not allowed any closer than 500 ft. from a roadway and or within 1,000 ft. of a dwelling; will this have any effect on this matter. Attorney Quirk stated yes, but that issue is not before the Board tonight.

Mr. Coutinho asked if the Board has received anything specific as to clearly show cars vs. metal recycling.

Attorney Markey stated that for many years, Mr. Moniz did vehicle crushing and not much scrap metal but Mr. Moniz said he went after the money where he could make it. Mr. Moniz stated that his operation was based on all dollars and cents and it depended on the market.

Mr. Harrison asked if there was any other materials or comments on this matter before the Board closed the hearing. No response was received.

Motion made by Ms. Lambert to close the hearing and open Board discussions and review of the Draft Decision. Second by Mr. Coutinho. The Board voted unanimously in favor.

Discussion: Attorney Quirk recommended that the Board review the copy of the draft decision she prepared on September 30, 2009. This draft included "Findings" of the Board.

Mr. Coutinho asked if the Board could set the hours of operation and if the Board could set a date and time to have the applicant come back.

Attorney Quirk stated that with a Special Permit, it is allowed or the Board can give notice that in 3 years, as long as there are no problems, renewal is made and there is no objection to the renewal.

Mr. Harrison stated that information was okay with a Special Permit but this Board is looking at a Finding.

Attorney Quirk stated this was an Administrative Finding by Special Permit. The Board reviewed the 1987 Notice of Findings.

Mr. Coutinho stated those businesses in the non-conforming areas and abutters need to have a say on this.

Attorney Quirk stated the Board had to make a decision with conditions. In the event of a violation of conditions, the Zoning Enforcement Officer takes control. The Board will want to put the applicant in jeopardy of having to get approval again. What you have heard is a noise complaint, figure out the decision and impose conditions.

Mr. Coutinho agreed with Attorney Quirk and stated the Zoning Enforcement Officer can only respond to specific complaints and in this way, there is a protection to the neighbors and it keeps the businesses in line.

Attorney Quirk said that a renewability clause should not be used as a condition.

Draft Decision Votes

Motion made by Ms. Lambert to accept the Procedural History as amended. Second by Mr. Coutinho. The Board voted unanimously in favor.

Motion made by Ms. Lambert to accept the changes to #1 through #36 for the Property and its' Historical Uses. Second by Ms. Fernandes. The Board voted unanimously in favor.

Substantive Findings

1. **Motion** made by Ms. Lambert that the Board finds that a lawfully pre-existing, nonconforming auto salvage has existed at the Property from 1970 to the present and that any such use has not been abandoned. Second by Mr. Coutinho. The Board voted unanimously in favor.
2. **Motion** made by Ms. Lambert that the Board finds that the Property and Lot 9 were used together as one commercial enterprise from 1973 to approximately 2006. Second by Mr. Coutinho. The Board voted unanimously in favor.
3. **Motion** made by Mr. Coutinho that the Board finds that Lot 9 was used primarily to store autos to support the auto salvage use at the Property. Second by Ms. Lambert. The Board voted unanimously in favor.
4. **Motion** made by Mr. Coutinho that the Board finds that Lot 9 is not available to the Property today to store autos, to support an auto salvage use at the Property because Lot 9 and the Property were conveyed into separate ownership. Second by Ms. Lambert. The Board voted unanimously in favor.
5. **Motion** made by Mr. Coutinho that the Board finds that the conveyance was a change in the use of the Property. Second by Ms. Lambert. The Board voted unanimously in favor.
6. **Motion** made by Ms. Lambert that the Board finds that a lawfully pre-existing scrap metal recycling facility use has existed at the Property from 1970 to the present and that any such use has not been abandoned. Second by Mr. Coutinho. The Board voted unanimously in favor.
7. **Motion** made by Mr. Coutinho that the Board finds that the auto salvage use was the primary use of the Property from 1970 to the 2000's. Second by Mr. Tripp. The Board voted unanimously in favor.
8. **Motion** made by Mr. Coutinho that the Board finds that the scrap metal recycling facility use was not the primary use of the Property from 1970 to the 2000's. Second by Ms. Fernandes. The Board voted unanimously in favor.
9. **Motion** made by Mr. Coutinho that the Board finds that a scrap metal recycling facility use at the Property existed at the Property from 1970 to 2006. Second by Ms. Fernandes. The Board voted unanimously in favor.
10. **Motion** made by Mr. Coutinho that the Board finds that Excel's present use of the Property is not primarily auto salvage. Second by Ms. Lambert. The Board voted unanimously in favor.
11. **Motion** made by Mr. Coutinho that the Board finds that Excel's present use of the Property is primarily scrap metal salvage. Second by Ms. Fernandes. The Board voted unanimously in favor.
12. **Motion** made by Mr. Coutinho that the Board finds that the January 24, 2008 site plan shows parking spaces that are not shown on aerial photographs that predate the site plan. Second by Ms. Fernandes. The Board voted unanimously in favor.
13. **Motion** made by Mr. Coutinho that the Board finds that Excel has not added a new retail component at the Property. Second by Ms. Fernandes. The Board voted 4 in favor, 1-abstention (Lambert).
14. **Motion** made by Mr. Coutinho that the Board finds that there has been a change in the use of the Property by:
 - a. Changing the use from primarily an auto salvage use to a primary scrap metal salvage facility use;

- b. Adding a new retail component; and
- c. Separating Lot 9 and the Property and discontinuing the use of Lot 9 for auto salvage. Second by Ms. Lambert. The Board voted unanimously in favor.

In making these findings, the Board understands that the burden of proof is on Excel to establish the nonconforming use and its nature; and the Board first made the subsidiary findings set forth below:

- a. **Motion** made by Mr. Coutinho that the Board finds that the current use by Excel does reflect the “nature and purpose” of the original non-conforming use of the Property in 1972. Second by Ms. Lambert. The Board voted unanimously in favor.
 - b. **Motion** made by Mr. Coutinho that the Board finds that there has been a difference in the “quality, character and degree of use” at the Property from the original nonconforming use in 1972. Second by Ms. Fernandes. The Board voted unanimously in favor.
 - c. **Motion** made by Mr. Coutinho that the Board finds that the current use is different in kind in its effect on the neighborhood than the original auto salvage nonconforming use of the Property because of evidence presented of the current operation and the current operation’s increase in scope, traffic impact and reduction in the size of the its current site. Second by Ms. Fernandes. The Board voted 3 in favor, 2-opposed (Harrison and Tripp).
15. **Motion** made by Ms. Lambert that the Board finds that there has been a change in use and that an Administrative Finding shall be issued because the use is not substantially more detrimental than the original nonconforming use, providing that the conditions of approval are satisfied. Second by Mr. Coutinho. The Board voted unanimously in favor.

Discussion among the members continued regarding the conditions, such as inserting noise control with a noise reduction barrier, while being reasonable about the cost to reduce the noise or to move the noise generating equipment away from abutting neighbors that are closer to the business. Mr. Coutinho stated the business does not have the flexibility to move things around because the lot is smaller compared to before the lot separation. Ms. Fernandes stated that noise travels but by putting the trailers around the property shows an honest attempt to block the noise. Mr. Coutinho stated the only enforceable way is to make reference to the noise decibel in which the neighbors monitor the noise and report it to the Zoning Enforcement Officer. Also discussed were issues of traffic and rearrangement of onsite equipment.

Attorney Quirk stated that if any member of the Board has a condition to add to the draft decision, to forward the change to the staff in the office and the staff can forward the changes to her office and the changes will then be redistributed to the Board.

Motion made by Ms. Lambert to continue this matter to Thursday, October 22, 2009 at 7:00 PM in the Town Hall. Second by Ms. Fernandes. The Board voted unanimously in favor.

Correspondence Received

1. A letter was received from Police Chief Pelletier regarding 37 Charlotte White Road. Letter was read into the record during the Excel hearing. No action taken.
2. A letter was received from Ronald Price regarding his report of noise meter readings during the site visit to 37 Charlotte White Road. Letter was read into the record during the Excel hearing. No action was taken.
3. A letter was received from Ronald Price requesting a copy of the Town Counsel's report on Excel. Mr. Coutinho stated there was a request for public documents. Mr. Coutinho stated he had no problem with releasing this document.
4. A letter was received from Ronald Price regarding a second addendum to a Memorandum of Opposition to Excel Recycling, LLC's petition for a Finding. No action was taken.
5. A notice was received for a "Citizen Planner Training Collaborative – Fall 2009 Workshop". No action was taken.

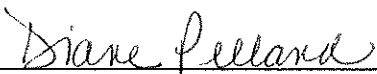
Discussion Required

1. The draft decision prepared by Town Counsel for Special Permit and Zoning Appeal regarding Excel Recycling was reviewed during the discussion part of the meeting. Any and all changes will be handled by Attorney Quirk.
2. Attorney Quirk stated she has reviewed very briefly, the Notice of Decision Amendment for Underwood Farms and will be forwarding her changes soon.

Motion made by Ms. Lambert to adjourn the Zoning Board of Appeals meeting at 11:00 PM. Second by Ms. Fernandes. The Board voted unanimously in favor.

Adjournment.

Respectfully submitted,



Diane Pelland, Principal Clerk
to the Zoning Board of Appeals

APPROVED: 

Donna Lambert, Clerk